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KHOR CHIN MIAW v. FRANK THEODORUS VAN DE VEN

HIGH COURT MALAYA, GEORGETOWN
AZIZAN MD ARSHAD JC
[PETITION NO: PA-33-334-09-2018]
12 SEPTEMBER 2022

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Abstract – *An absolute decree nisi obtained by a petitioner can be altered, varied or set aside by way of an application, if it can be proved that there are errors, fraud or lack of jurisdiction. In a case where a petitioner wife is not domiciled in Malaysia at the time when the divorce petition is presented, coupled with failure on her part to present full disclosure of facts, there is clearly a non-compliance of the requirements of the Legal Reform (Marriage and Divorce) Act 1976, rendering the decrees obtained improper, null and void.*

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FAMILY LAW: *Divorce – Foreign marriage – Domicile – Petitioner wife obtained decree nisi and ex parte application to be exempted from ss. 48(1)(c) and 106 of Law Reform (Marriage and Divorce) Act 1976 ('LRA') – Respondent husband filed application to vacate all ex parte orders – Whether there was non-compliance of LRA – Whether court has jurisdiction to issue decree nisi under s. 48 of LRA – Whether petition filed less than two years after petitioner wife came back to Malaysia – Whether decree nisi could be overturned through appeal or application – Whether there was delay in respondent husband filing application – Whether orders irregularly obtained and ought to be set aside – Whether decrees null and void*

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The respondent husband ('RH'), a citizen of the Kingdom of Netherlands, married the petitioner wife ('PW') a Malaysian citizen. The marriage was registered at the Malaysian Embassy at The Hague on 29 August 2017. They were blessed with a son ('FKVDV'). At all material times of the marriage up until February 2018, the both of them had resided in Belgium. The PW, RH and FKVDV had relocated to the Caribbean Island of Aruba ('Aruba') in February 2018. Unfortunately, while in Aruba, the relationship between PW and RH broke down. PW filed a petition in the Court of First Instance of Aruba ('the Aruban petition') seeking, amongst others, an order to bring FKVDV to Malaysia. The Aruban court allowed the PW to bring FKVDV to Malaysia ('Aruban court ruling'). In Malaysia, the PW filed a single petition for a divorce. *Decree nisi* was granted and became a *decree nisi* absolute. The PW obtained an *ex parte* application to be exempted from ss. 48(1)(c) and 106 of the Law Reform (Marriage and Divorce) Act 1976 ('LRA'). The RH filed an application ('encl. 33') to vacate all *ex parte* orders based on non-compliance and the court's jurisdiction under ss. 48, 49 and 106 of the LRA. The issues that arose were (i) whether this court had jurisdiction to issue a *decree nisi* under s. 48 of the LRA; (ii) whether the

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petition was filed less than two years after the petitioner wife came back to Malaysia; (iii) could a *decree nisi* be overturned through an appeal or application; and (iv) whether there was a delay in RH filing the application.

Held (granting application):

(1) Section 48 of the LRA gives the court the power to make a *decree* of divorce only 'where the domicile of the parties to the marriage at the time when the petition is presented is in Malaysia.' This court must satisfy itself that the domiciles of both parties were in Malaysia at the time when the petition was presented. The PW was not domiciled in Malaysia and therefore could not be granted the Malaysian decrees as a relief from this court due to the lack of jurisdiction as the petitioner was not domiciled in Malaysia and, in fact, had spent minimal time in Malaysia over a duration of two years between 2016 and 2018 for only 53 days. Therefore, as the LRA had set out the mandatory requirements, it would be at least two years before this court could grant relief. The PW did not meet the requirements set out in the LRA for this court to grant the Malaysian decrees. (paras 13, 16 & 17)

(2) The PW had acquired the husband's domicile, which in this case was Belgium. Whether the issue of domicile under s. 48(1)(c) of the LRA could be exempted, the PW must show that the PW had been deserted by the RH or had been ordinarily resident in Malaysia for a period of two years before the filing of the proceedings. Herein, the PW left the RH and not that the PW had been deserted by the RH. But the PW had been granted an order by the court to dispense with the conditions of two years and to refer to a conciliatory body under s. 106 of the LRA. This application was to set aside the order as the RH contested it was obtained without the full disclosure of facts of the PW. The RH showed that they were together in Aruba before his wife deserted him and came back to Malaysia. The PW's claim that she could not contact the RH was false. (paras 20, 25 & 26)

(3) An application to the court by way of an originating summons for leave must be made before presenting the divorce petition. The application must be supported by an affidavit setting out the reasons and basis for the 'request, addressing the exceptional circumstances and hardship, the interests of any children, and whether any reconciliation will be possible.' The PW did not disclose all the material facts before the court. The order was thus irregularly obtained and must be set aside. The PW had adopted RH's domicile and failed to comply with s. 49 of the LRA. (paras 29-31)

(4) The PW objected to this application by submitting that this court could not overturn this *decree nisi* by way of application but must be through appeal. However, there are exceptions to the general rule which are, *inter alia*, (i) to correct errors in expressing the intention of the court;

A (ii) judgment obtained by fraud; (iii) judgment obtained was null and void on grounds of illegality or lack of jurisdiction. Therefore, an absolute *decree nisi* could be altered, varied or set aside by way of an application if it can be proved that there were errors, fraud or lack of jurisdiction. (paras 32-36)

B **(5)** All the orders were issued *ex parte*. An *ex parte* order is not a final order and can be set aside. Based on the facts and evidence, the allegations that the wife did not know the whereabouts of the husband contradicted each other. Further, the PW had been granted with a *decree nisi* to be made absolute immediately. Therefore, there was no chance for the RH to take C any action before the dissolution of marriage took place. There was no 'unexplained delay' and there were only gaps of two years and ten months between the *decree nisi* being made absolute and the application to set aside the *ex parte* order being filed by the RH. (paras 38, 43 & 45)

(6) The fact that both parties agreed to a divorce was undeniable. The PW D obtained an absolute decree from this court on 22 March 2019 whereas the RH obtained a divorce decree in Belgium on 28 August 2019. The only point of contention between the parties was the relief granted by this court in response to the divorce petition filed. They could, however, file a joint petition. (para 48)

E **(7)** The legal position is settled that where an order of the court has not been regularly obtained, any party is entitled as of right to have it set aside *ie*, *ex debito justitiae*, irrespective of the merits and without any terms. Such court power is inherent and does not require any statutory provision. The said decrees were obtained improperly from this court, F rendering them null and void. (paras 49 & 50)

Case(s) referred to:

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

C v. A [1998] 4 CLJ 38 HC ***(refd)***

Chow Chuan Fat v. Yeo Chai Seng & Ors [2018] 1 LNS 983 HC ***(refd)***

G *Eu Finance Bhd v. Lim Yoke Foo [1982] 1 LNS 21 FC* ***(refd)***

Gurcharan Singh Karnal Singh v. Mninder Kaur A Ip Piara Singh [2011] 2 CLJ 204 HC ***(refd)***

Hock Hua Bank Bhd v. Sahari Murid [1980] 1 LNS 92 FC ***(refd)***

Hung Moy v. Ang Cha Hooi [2021] 8 CLJ 616 CA ***(refd)***

In Re Gan Eu Gin & Anor [2019] 1 CLJ 110 HC ***(refd)***

H *In Re Yamamoto Ryoji & Anor; Petitioners [2020] 10 CLJ 75 HC* ***(refd)***

In Re: Ng Boon Chwee & Anor [2018] 1 LNS 744 HC ***(refd)***

Kanmani v. Sundarampillai [1957] 1 LNS 30 HC ***(refd)***

Khaw Poh Chhuan v. Ng Gaik Peng & Yap Wan Chuan & Ors [1996] 2 CLJ 185 SC ***(refd)***

Khoo Kay Peng v. Pauline Chai Siew Phin [2014] 10 CLJ 403 HC ***(refd)***

I *Kiranjit Kaur Kalwant Singh v. Chandok Narinderpal Singh [2010] 3 CLJ 724 HC* ***(refd)***

Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2004] 1 CLJ 239 CA ***(refd)***

Liew Nyuk Ching v. Jong Khee Kie [2013] 4 MLJ 930 ***(refd)***
Low Choon Kung v. Tham Chan Kum [2004] SGDC 139 ***(refd)***
Macquarie (Malaysia) Sdn Bhd v. HSBC Bank Malaysia Bhd & Anor And Another Appeal [2007] 6 CLJ 176 CA ***(refd)***
Melvin Lee Campbell v. Amy Anak Edward Sumek [1988] 1 LNS 19 HC ***(refd)***
Neduncheliyan Balasubramaniam v. Kohila Shanmugam [1997] 4 CLJ 676 CA ***(refd)***
Pachayamah Pachaiappan v. Guenda Raju Karuppia [2022] 1 LNS 968 HC ***(refd)***
Re Prasert Wongphattarakul & Anor [1997] 3 CLJ 87 HC ***(refd)***
Selvam Holdings (Malaysia) Sdn Bhd v. Grant Kenyon & Eckhardt Sdn Bhd; BSN Commercial Bank Malaysia & Ors (Intervenors) [2003] 1 CLJ 465 HC ***(refd)***
Siah Teong Woei v. Janet Traynor [2010] 3 CLJ 361 HC ***(refd)***
Tenaga Nasional Bhd v. Tan Sooi Lek & Ors [2022] 6 CLJ 177 FC ***(refd)***
William Tan Guan Hock v. Khor Chai Heah [1990] 1 CLJ 895; [1990] 1 CLJ (Rep) 308 SC ***(refd)***
Wong Cheng Ping v. Chin Guan Seng [2010] 10 CLJ 743 HC ***(refd)***

Legislation referred to:
Law Reform (Marriage and Divorce) Act 1976, ss. 48(1)(c), 49(1), 61(1), 106

For the petitioner - WB Chuah; M/s Ng Kee Way & Co
For the respondent - Leng Wie Mun & Reuben Ong Shen Myn; M/s Kevin & Co

Reported by Suhainah Wahiduddin

JUDGMENT
(encl. 33)

Azizan Md Arshad JC:

[1] This court on 26 August 2022, allowed encl. 33 with no order to costs. The petitioner had appealed to the Court of Appeal. These are my grounds of judgment. The appellant and the respondent are to be referred to as they were in the High Court.

[2] The defendant filed a notice of application dated 11 February 2022 (encl. 33) for the following orders:

(i) to strike out the divorce petition dated 4 September 2018;

(ii) to set aside the court order and *decree nisi* dated 21 February 2019 and certificate to make decree absolute dated 1 April 2019;

(iii) that the entry in the register of marriage at the National Registration Department (Marriage and Divorce Department) of Malaysia relating to the marriage of the petitioner and respondent be marked with the word "married";

(iv) that the Registrar-General be directed with the power to cause the entry in the register of marriage at the National Registration Department (Marriage and Divorce Department) of Malaysia relating to the marriage of the petitioner and respondent to be marked with the word "married";

A (v) costs of application to be borne by the petitioner; and

(vi) any other relief that this Honourable Court deemed fair and reasonable.

Cause Papers

B **[3]** The petitioner and the respondent refer to the following cause paper:

(i) petition for divorce dated 5 September 2018 ("encl. 1");

(ii) *decree nisi* dated 21 February 2019 ("encl. 14");

(iii) decree absolute dated 1 April 2019 ("encl. 17");

C (iv) respondent's notice of application to set aside dated 11 February 2022 ("encl. 33");

(v) respondent's affidavit in support affirmed by Frank Theodorus Van De Ven on 20 January 2022 ("encl. 34");

D (vi) petitioner's affidavit in reply affirmed by Khor Chin Miaw on 21 April 2022 ("encl. 36");

(vii) respondent's affidavit in reply affirmed by Frank Theodorus Van De Ven on 16 May 2022 ("encl. 37").

Background Facts

E **[4]** At all material times, the respondent husband ("RH") is a citizen of the Kingdom of Netherlands having a service address at St Luciestraat 14, 3631 Maasmechelen, Belgium. Petitioner wife ("PW") is a Malaysian citizen.

F **[5]** On 4 July 2017, the PW had married the RH in the Netherlands and the marriage registered at the Malaysian Embassy at The Hague on 29 August 2017. At all material times of the marriage up until February 2018, the both of them had resided in Belgium. They were blessed with a son by the name of FKVDV on 23 May 2017 ("FKVDV").

G **[6]** The PW, RH, and Felix had relocated to the Caribbean Island of Aruba ("Aruba") in February 2018 and planned to stay for the RH's new employment contract. Unfortunately, while in Aruba, the relationship between PW and RH had a problem and broken down.

H **[7]** PW filed a petition in the court of first instance of Aruba ("the Aruban petition") seeking, amongst others, an order to bring FKVDV to Malaysia. On 16 May 2018, the Aruban court allowed the PW to bring FKVDV to Malaysia. ("Aruban court ruling"). Even though there is a pending appeal against the Aruban court ruling, the PW brought FKVDV back to Malaysia.

I **[8]** In Malaysia, the PW had filed a single petition for a divorce on 5 September 2018 which is merely four months after leaving Aruba. *Decree nisi* was granted on 21 February 2019 and became a *decree nisi* absolute on 1 April 2019.

[9] In this case, the PW has obtained an-*ex parte* application to be exempted from ss. 48(1)(c) and 106 of the Law Reform (Marriage and Divorce) Act 1976 ("LRA"). The order of *decree nisi* of 21 February 2019 and the certificate to make decree absolute of 1 April 2019 were both granted.

[10] This application (encl. 33) is filed to vacate all *ex parte* orders based on non-compliance and the court's jurisdiction under ss. 48, 49 and 106 of the LRA.

Issues

Does This Court Have Jurisdiction To Issue A Decree Nisi Under Section 48 Of The LRA?

Domicile

[11] The PW submits that RH made this application pursuant to ss. 48 and 49 of LRA based on the argument that this court does not have the jurisdiction to grant the decree absolute dated 1 April 2019 as when the divorce petition dated 5 September 2018 was filed, the petitioner and respondent did not domicile in Malaysia but in Belgium.

[12] Both parties refer to ss. 48 of the LRA which states as follows:

> Under s. 48(1) of the Law Reform (Marriage and Divorce) Act 1976 ("LRA") the jurisdiction of this court has been clearly established as follows:
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> (i) Nothing in this Act shall authorise the court to make any decree of divorce except:
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> (a) where the marriage has been registered or deemed to be registered under this Act; or
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> (b) where the marriage between the parties was contracted under a law providing that, or in contemplation of which, marriage is monogamous; and
>
> **(c) where the domicile of the parties to the marriage at the time when the petition is presented is in Malaysia?**
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> (emphasis added)

[13] Section 48 of the LRA gives the court the power to make a decree of divorce only 'where the domicile of the parties to the marriage at the time when the petition is presented is in Malaysia'. This court must satisfy itself that the domiciles of both parties were in Malaysia at the time the petition was presented.

[14] In the Supreme Court decision in *William Tan Guan Hock v. Khor Chai Heah* [1990] 1 CLJ 895; [1990] 1 CLJ (Rep) 308; [1990] 1 MLJ 422, Gunn Chit Tuan SCJ (as he then was) at p. 311 e to f observed:

A ... The petitioner would still have to prove and satisfy the court that both he and the respondent were domiciled in Malaysia at the time when the petition was presented before the court could exercise its powers under s 48 of the Law Reform (Marriage and Divorce) Act to grant any relief to the parties.

B **[15]** Tan Thiaw Chong J in *Melvin Lee Campbell v. Amy Anak Edward Sumek* [1988] 1 LNS 19; [1988] 2 MLJ 338, also observed:

The provision of s. 48(1)(c) in my view requires that the court must be satisfied that at the time when the petition in the instant case was presented the domicile of both the petitioners was in Malaysia.

C **[16]** The RH submits that at all material times, the PW was not domiciled in Malaysia and therefore cannot be granted the Malaysian decrees as a relief from this court due to the lack of jurisdiction as it clearly proved that the petitioner was not domiciled in Malaysia and, in fact, had spent minimal time in Malaysia over a duration of two years between 2016 and 2018 for D only 53 days.

[17] Therefore, the LRA has set out the mandatory requirements, it will be at least two years before this court can grant relief. In this case, the PW does not meet the requirements set out in the LRA for this court to grant the Malaysian decrees.

E **[18]** Other than s. 48 of the LRA, s. 49 of the LRA provides exceptions to the 'domicile test'. These exceptions are granted to a wife to avoid the injustices contingent upon the strict adherence to the application of the principle that a wife does not have and cannot acquire a separate domicile of choice. This is provided in cases where the proceedings for divorce are F commenced by a wife and not by a husband. Section 49 of the LRA provide as follows:

(i) Notwithstanding anything to the contrary in para. 48(1)(c), the court shall have jurisdiction to entertain proceedings by a wife under this part, although the husband is not domiciled or resident in Malaysia G if:

(a) **the wife has been deserted by the husband**, or the husband has been deported from Malaysia under any law for the time being in force relating to the deportation of persons, and the husband was before the desertion or deportation domiciled in Malaysia; H or

(b) **the wife is resident in Malaysia and has been ordinarily resident in Malaysia for a period of two years immediately preceding the commencement of the proceedings**.

(ii) In any proceedings in which the High Court has jurisdiction by I virtue of this section, the issues shall be determined in accordance with the law which would be applicable thereto if the parties were domiciled or resident in Malaysia.

(iii) In this section references to deportation from Malaysia shall be construed as including banishment or expulsion under any written law.

(emphasis added)

[19] The PW submits that she is a Malaysian. She has a Malaysian passport, has a Malaysia National identity card and has been staying in Malaysia for 38 years in her 45 years of life. The petitioner wanted to divorce the RH and to permanently live and work in Malaysia, where the petitioner's family also resides.

[20] Based on the facts of this case, it is clearly shown that the PW acquires the husband's domicile, which in this case is Belgium. This was recognised by the Court of Appeal in the case of *Neduncheliyan Balasubramaniam v. Kohila Shanmugam* [1997] 4 CLJ 676, held that:

On the uncontested material before us we are of the opinion any Malaysian woman upon marriage will acquire her husband's domicile and until that marriage is lawfully dissolved she will retain the domicile of her husband. See *Halsbury's Laws of England* 4th Edn, Vol. 8 para. 431 at p. 323.

[21] In the case of *Kanmani v. Sundarampillai* [1957] 1 LNS 30; [1957] MLJ 172. This principle was also reiterated in the case of *Re Prasert Wongphattarakul & Anor* [1997] 3 CLJ 87 wherein it was stated as follows:

At common law, a married woman acquires her husband's domicile during the subsistence of the marriage. This common-law position is given statutory recognition in s. 48(1)(c) of the Act by the requirement for the domicile of the parties to be in Malaysia (emphasis added) before the court can entertain proceedings for a decree of divorce. It is because of this reference to the single or common Malaysian domicile of the parties, which is predicated upon the wife having or acquiring the Malaysian domicile of the husband, that the Parliament had found it necessary to enact s. 49(1) of the Act to grant relief to a wife who has been deserted by her husband or whose husband has been deported from Malaysia, and whose husband was before the desertion or deportation domiciled in Malaysia, by enabling the wife to bring proceedings although the husband is not domiciled or resident in Malaysia at the time the petition is presented.

[22] In *Siah Teong Woei v. Janet Traynor* [2010] 3 CLJ 361; [2010] 2 MLJ 820 the court held as follows:

[14] In Malaysia, the law on domicile is similar to common law. As regard to a domicile of dependence, a woman takes the domicile of her husband upon marriage. In another word a married woman cannot acquire a domicile separate from that of her husband. *A married couple have therefore, only one domicile and that is the domicile of the husband. The logic for this dependence is because under common law, a husband and a wife are viewed as one*

A *entity. The woman takes her husband's domicile upon marriage and she retains it. She can abandon her husband's domicile but she has to prove and satisfy the court that the abandonment is permanent and unequivocal before the court can take cognisance of it.*

(emphasis added)

B **[23]** In the case of *Khoo Kay Peng v. Pauline Chai Siew Phin* [2014] 10 CLJ 403; [2015] MLJU 158, the court held that:

> However, the question now is whether the next requirement in s. 48(1)(c) of the LRA for both parties to be domiciled in Malaysia at the time when the petition is presented can be fulfilled. This is in view of the Wife's
C assertion that she is now not domiciled in Malaysia, but in England. The burden of proof is on the Husband to prove that both he and the Wife are domiciled in Malaysia.

In our case, based on the facts of this case, the PW follows the RH's domicile.

D *Whether The Petition Was Filed Less Than Two Years After The Wife Came Back To Malaysia?*

Condition And Jurisdiction

[24] Section 49(1) of the LRA contains a provision and additional
E jurisdiction for the court to determine a wife's proceedings notwithstanding anything to the contrary in s. 48(1)(c) if the wife has been deserted by the husband or if the wife is resident in Malaysia and has been ordinarily resident in Malaysia for two years immediately preceding the commencement of the proceedings.

F **[25]** Therefore, in our case, whether the issue of domicile under s. 48(1)(c) of the LRA can be exempted, the PW must show that the PW has been deserted by the RH or has been ordinarily resident in Malaysia for a period of two years before the filing of the proceedings.

[26] Based on the facts of the case, the PW left the RH and not that the PW
G had been deserted by the husband. But in this case, the PW has been granted an order by the court to dispense with the conditions of two years and to refer to a conciliatory body under s. 106 of the LRA. This application is to set aside the order as the RH contested it was obtained without the full disclosure facts of the PW. The RH in his affidavit has shown that, they were together
H in Aruba before his wife deserted him and came back to Malaysia. The PW's claim that she could not contact the RH was false, and it was supported by the immigration officer's endorsement on her passport. It was shown that the PW was with the husband in Aruba for four months before she came back to Malaysia.

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[27] In the case of *Gurcharan Singh Karnal Singh v. Mninder Kaur Piara Singh* [2011] 2 CLJ 204; [2010] 6 MLJ 405, the court held:

> [43] The Malaysian court will assume jurisdiction if the marriage was registered in Malaysia and the parties are domiciled in Malaysia at the time of the commencement of the proceedings (s. 48) or where the wife has been resident here in Malaysia for at least two years immediately preceding the commencement of filing for divorce in the case where the husband has deserted her (s. 49).
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> [44] *In light of ss 48 and 49 of the LRA 1976, the Malaysian court will have jurisdiction to dissolve this Malaysian marriage, where parties are of Malaysian domicile or in any event, where the wife continues to be resident here in Malaysia after the husband has deserted her ...*
>
> (emphasis added)

[28] In *C v. A* [1998] 4 CLJ 38; [1998] 6 MLJ 222; the court held that:

> ... in relying on the provisos, including s 106(1)(vi) of the LRA, **the court to be satisfied with the existence of the exceptional circumstances which make reference to a conciliatory body impracticable**, a party can proceed to file a divorce petition.
>
> (emphasis added)

[29] An application to the court by way of an originating summons for leave must be made before presenting the divorce petition. The application must be supported by an affidavit setting out the reasons and basis for the "request, addressing the exceptional circumstances and hardship, the interests of any children, and whether any reconciliation will be possible" (see *Kiranjit Kaur Kalwant Singh v. Chandok Narinderpal Singh* [2010] 3 CLJ 724 for what constitutes exceptional circumstances and hardship).

[30] Therefore, the application to dispense with the mandatory procedure under ss. 48 and 49 of the LRA cannot be sustained if those facts were produced before the court. Based on the affidavits supporting this application, this court is satisfied that the PW did not disclose all the material facts before the court. The order was irregularly obtained and must be set aside.

[31] *In Re Yamamoto Ryoji & Anor; Petitioners* [2020] 10 CLJ 75; [2021] 8 MLJ 386, the court held that:

> ... In the Nuraisyah Chua Abdullah, Law Reform (Marriage and Divorce Act) 1976, Commentary and Cases (2nd Ed), *the learned author commented that s. 49 of the LRA is an exception to the general rule that only parties who are domiciled in Malaysia may a petition, be it contested or joint for divorce. However, this exception applies only in cases where the petition is filed by the wife (and not by a husband). If the marriage breaks down, and as a consequence, the wife returns to Malaysia, she may then file proceedings for divorce after residing in Malaysia for two years.*
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> (emphasis added)

Based on the facts of our case, it can be concluded that the PW had adopted RH's domicile and failed to comply with s. 49 of the LRA:

(i) the PW filed this proceeding only four months after returning to Malaysia;

(ii) the PW left the RH;

(iii) the petition was filed less than two years after the wife came back to Malaysia; and

(iv) in the divorce petition, the PW admitted that both of them had not cohabitated in Malaysia.

(v) PW and FKVDV only reside in Penang starting from 18 May 2018.

(vi) the PW did not dispute that both of them had been divorced in Belgium based on the court order dated 20 August 2019.

Can A Decree Nisi Be Overturned Through An Appeal Or Application?

Modes Of Application

[32] The PW objected to this application by submitting that this court cannot overturn this *decree nisi* by way of application but must be through appeal. The PW contends that, it is undeniable that both parties agreed to divorce. This is evident in the fact that the PW had obtained a decree absolute in this court on 22 March 2019 while the respondent obtained a divorce decree in Belgium on 28 August 2019. The disagreement between the parties was only the relief granted by this court pursuant to this divorce petition filed.

[33] The PW submits that the only remedy for the respondent is to lodge an appeal and not to file this application to set aside the orders. However, it is the PW's submission that this method of lodging an appeal is also no longer available to the respondent as the time period of 30 days had lapsed.

[34] In the case of *Wong Cheng Ping v. Chin Guan Seng* [2010] 10 CLJ 743, at p. 751, where the High Court held, in *obiter*, as follows:

> [32] There is no provision in the Act for rescinding or setting aside a *decree nisi* that already has been made absolute. It appears to me that it is the intention of Parliament to preserve the integrity and finality of a *decree nisi* that already has been made absolute after three months. **As such, parties are not allowed to freely apply to the court at any time to rescind or set aside unless for very good reasons or in exceptional circumstances**.
>
> (emphasis added)

[35] In the case of *In Re: Ng Boon Chwee & Anor* [2018] 1 LNS 744; [2018] MLJU 737, the court held that:

> [40] This Court is of the considered view that since the Act is silent on the court's power to rescind a decree absolute following a *decree nisi* for dissolution of a marriage, **therefore, the general legal principles for setting aside a perfected judgment or order of a court shall apply in a case of decree absolute**.
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> [41] It is said that 'when a judgment or order has been perfected or sealed ... the court is deemed to be *functus officio* and the general principle is that the court has no power under any application in the same action to alter, vary or set aside a judgment regularly obtained after it has been entered or an order after it has been drawn up' (see *Malaysia Civil Procedure 2015*, vol. 1, 565).
>
> [42] However, there are exceptions to the general rule. The exceptions are, *inter alia*, that (i) to correct errors in expressing the intention of the court; (ii) judgment obtained by fraud; (iii) judgment obtained is null and void on ground of illegality or lack of jurisdiction (see *Eu Finance Bhd v. Lim Yoke Foo* [1982] 2 MLJ 37 and *Badiaddin bin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 1 MLJ 393).
>
> (emphasis added)

[36] According to the case of *Eu Finance Bhd v. Lim Yoke Foo* [1982] 1 LNS 21; [1982] 2 MLJ 37 and *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393, there are exceptions to the general rule. The exceptions are:

(i) to correct errors in expressing the intention of the court;

(ii) judgment obtained by fraud;

(iii) judgment obtained is null and void on ground of illegality or lack of jurisdiction.

(See also *In Re: Ng Boon Chwee & Anor* [2018] 1 LNS 744; [2018] MLJU 737).

Therefore, this court is of the opinion that an absolute *decree nisi* can be altered, varied or set aside by way of an application if it can be proved that there are errors, fraud or lack of jurisdiction.

Is There A Delay In RH Filing An Application?

Time-framed

[37] In the case of *Hung Moy v. Ang Cha Hooi* [2021] 8 CLJ 616; [2021] 5 MLJ 337, the court held that:

> [28] In response, learned counsel for the respondent submitted there is no delay because the respondent was never served with the *decree nisi* and the *decree nisi* absolute until today (as at the day this appeal was heard on 23 November 2020).

A [29] After hearing the parties' submission, we are not in agreement with the respondent. We agree with the appellant's submission that the respondent who had constantly in contact with his son must have known about the divorce much earlier than the year 2015. But the respondent did nothing. From the date the *decree nisi* was granted on 2 June 2010 to the date of the application on 8 December 2017, we agree there is an
B inordinate delay of more than seven years. It is trite law that the court will not lend assistance to a litigant who slept on his right.

[38] In our case, all of the orders were issued *ex parte*. The time taken by the husband is reasonable. On top of that, an *ex parte* order is not a final order and can be set aside. Based on the facts and evidence, the allegations that the
C wife did not know the whereabouts of the husband contradicted each other. For example, in April 2018, they were together in Aruba, which was not proved that the husband had deserted her.

[39] It is always that the burden is on the applicant to prove, on the balance
D of probabilities, that exceptional circumstances are present to justify the court's intervention (see *Khaw Poh Chhuan v. Ng Gaik Peng & Yap Wan Chuan & Ors* [1996] 2 CLJ 185; [1996] 1 MLJ 761; [1996] 1 AMR 909 (FC); *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd (supra)*).

[40] In *Macquarie (Malaysia) Sdn Bhd v. HSBC Bank Malaysia Bhd & Anor*
E *And Another Appeal* [2007] 6 CLJ 176; [2007] 7 MLJ 139; [2007] 6 AMR 188 (CA), in consonance with the findings of *Hock Hua Bank Bhd v. Sahari Murid* [1980] 1 LNS 92; [1981] 1 MLJ 143 (FC); *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* (*supra*); *Selvam Holdings (Malaysia) Sdn Bhd v. Grant Kenyon & Eckhardt Sdn Bhd; BSN Commercial Bank Malaysia & Ors*
F *(Intervenors)* [2003] 1 CLJ 465; [2003] 1 MLJ 251; [2003] 1 AMR 439; and *Chow Chuan Fat v. Yeo Chai Seng & Ors* [2018] 1 LNS 983; [2018] MLJU 914; [2017] 1 AMR 676; that the jurisdiction to set aside such a judgment is not to be exercised as a matter of course but in limited circumstances. It is only to be used where:

G (i) breach of the rules of natural justice;

(ii) lack of jurisdiction;

(iii) illegality, *ie*, contravention of a substantive statutory provision;

(iv) serious defects; or

H (v) fraud.

[41] The burden lies on the RH to satisfy the court that the matter comes within the ambit of those aforesaid circumstances. The facts of the case must be considered by this court based on the affidavit filed by both parties. In
I the case of *Hung Moy v. Ang Cha Hooi* [2021] 8 CLJ 616; [2021] 5 MLJ 337 the *decree nisi* and *decree nisi* absolute is reinstated when there is inordinate delay and no good reasons to be set aside. In *Hung Moy v. Ang Cha Hooi* (*supra*) the court held that:

> To us, para. 35 above show the respondent agrees that the marriage has irretrievably broken down and could not be saved. That the respondent can see their marriage is over with the presence of a third party. That the time has come for the respondent to accept the fact that their marriage should be dissolved no matter what his terms are. The appellant has re-marry someone else. *The parties have been living apart for more than ten years (from 2008 until now). The delay in approaching the court. On top of that both the appellant and the respondent are now in their ripe old age of 70 years old. How much longer can both of them lived. We were of the considered view that these are the relevant factors that the High Court judge should have considered before setting aside the decree nisi and decree nisi absolute.* To us, for the appellant to start again the divorce proceedings for the second time is unduly harsh and unfair. *Given the circumstances the appellant is in, we are of the view that the respondent had no good reasons to set aside the decree nisi and decree nisi absolute*. On this ground alone, we took the view that the learned High Court Judge had erred in setting aside the *decree nisi* and *decree nisi* absolute.
>
> (emphasis added)

[42] In the case of *Liew Nyuk Ching v. Jong Khee Kie* [2013] 4 MLJ 930, where the *decree nisi* that was made absolute was set aside based on the merits of the case. In a Singapore case, *Low Choon Kung v. Tham Chan Kum* [2004] SGDC 139, where it was held that:

> Decree absolute was set aside. This decision illustrates not only that the decree absolute may be set aside, but the mere fact that a decree absolute had been issued is not an automatic bar to the rescission of the *decree nisi* ... However, I am of the view that the court should have the power to rescind a decree absolute even if there has been procedural regularity in service, if circumstances exist which justify the rescission of the *decree nisi*. The reason for this that it would be wrong in principle if the court's ability to deal with a situation which warrants a rescission of the *decree nisi* (*ie*, by rescinding the *decree nisi*) depended on whether a decree absolute happened to have been issued or not. *Thus, if the court sees fit to rescind a decree nisi, it should be able to do so, whether or not a decree absolute exists. If a decree absolute exists, then the court should also be able to rescind the decree absolute- indeed, if the decree nisi is rescinded, the decree absolute must also be rescinded, as the latter is an order which is issued to perfect the former, and should not be able to exist without it*.
>
> (emphasis added)

(See *In Re Gan Eu Gin & Anor* [2019] 1 CLJ 110; [2019] 7 MLJ 430).

[43] In our case, the PW has been granted with a *decree nisi* to be made absolute immediately. Therefore, there was no chance for the RH to take any action before the dissolution of marriage took place. This issue has been commented on in the case of *In Re Gan Eu Gin & Anor* [2019] 1 CLJ 110; [2019] 7 MLJ 430 as follows:

> It is also my considered view that *the three months period for the said decree nisi to be made absolute is a reasonable enough time to allow parties to appraise their respective situation prior to the absolute dissolution of the said marriage taking place.*

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> *It is a time period as prescribed by the Act as framed by the legislators*. The court is empowered to grant a lesser waiting period but not more than what is prescribed in the Act (s 61(1) of the Act). Consequently, the issue of abridging or enlarging the time period do not arise.
>
> (emphasis added)

B

[44] In the case of *Wong Cheng Ping v. Chin Guan Seng* [2010] 10 CLJ 743; [2010] MLJU 226, the court has considered the time taken and the lack of answers by the respondent as reasons to set aside the order. In *Wong Cheng Ping v. Chin Guan Seng* (*supra*), the court held that:

C

> The *Decree Nisi* was granted since the *respondent was absent and no answer had been filed by him*. The *Decree Nisi* has already been made absolute. The effect is that the petitioner and the respondent are already divorced. *It would require a very good reason for such divorce status of the parties to be reversed or disturbed. The petitioner should not be put in the predicament of an overnight change of her marital status when she was at all times thinking that she was already divorced for more than 7 years, only to get the rude shock that suddenly such divorce can now be set aside and the divorce petition re-heard just because, finally, the respondent has decided to take action. In the first place, the respondent has not given any good reason to the Court as to why he did not file his answer to the divorce petition, or why he was not present in Court on 22.7.1999* [see also the decision of Siti Norma Yaakob J. (as she then was) in *Yeop Chooi Peng v. P Manogram Packirisamy* [1988] 1 LNS 85].
>
> (emphasis added)

D

E

[45] In our case, there is no "unexplained delay" and there were only gaps of two years and ten months between the *decree nisi* being made absolute and the application to set aside the *ex parte* order being filed by the RH. If he failed to show any good reasons, the court would not entertain this application, as can be seen in the case of *Pachayamah Pachaiappan v. Guenda Raju Karuppia* [2022] 1 LNS 968; [2022] MLJU 984, where the court held that:

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> [22] *In my view, where an order for dissolution of a marriage is made in the respondent's absence, the predominant consideration in deciding whether to set aside the order is the reason for the respondent's absence*. The reasons for a respondent's non-attendance must be seriously viewed in instances where the respondent's omission is deliberate.
>
> [23] There is no merit in the respondent's submission *he did not attend the hearing as he was unaware of the divorce proceedings. As his non-attendance was deliberate, it does not constitute a good reason to set aside the decree nisi and decree nisi absolute which are regularly-obtained orders*.
>
> (emphasis added)

H

I

[46] In *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2004] 1 CLJ 239; [2004] 1 MLJ 316, held that

> ... wherever there is any non-disclosure of any material fact in an *ex parte* application, that *ex parte* order must certainly be discharged or set aside on ground of the non-disclosure alone.

[47] The *ex parte* order issued against the RH is not a final order. In *Tenaga Nasional Bhd v. Tan Sooi Lek & Ors* [2022] 6 CLJ 177; [2022] 4 MLJ 236, the court held that:

> [34] *Ex parte* is a Latin expression which is used to signify something done or said by one person not in the presence of his opponent. In other words, *ex parte* applications are heard in the absence of the party against whom the order is sought. *Ex parte* orders are commonly sought in situation of urgency or where the purpose of the application would be frustrated if the other party were to have knowledge of the proceedings, and even, if necessary, before the writ is issued (Anandan Krishnan, *Words, Phrases & Maxims: Legally & Judicially Defined*, Lexis Nexis Vol 6E at para E0697; O.. 29 r. 3 of the ROC 2012). In contrast, the legalese term *inter partes* refers to a hearing on notice to both parties. In this instance, both adversaries are given advance notice of the date and time of the hearing and are required to attend the hearing.
>
> [35] **Since an *ex parte* order is made in the absence of the opposing party and without the benefit of adversary argument, an *ex parte* order is not a final order**.
>
> (emphasis added)

Conclusion

[48] Furthermore, the fact that both parties agreed to divorce is undeniable. The petitioner obtained an absolute decree from this Honourable Court on 22 March 2019, whereas the respondent obtained a divorce decree in Belgium on 28 August 2019. The only point of contention between the parties was the relief granted by this court in response to the divorce petition filed. They can, however, file a joint petition.

[49] The legal position is settled that where an order of the court has not been regularly obtained, any party is entitled as of right to have it set aside, *ie*, *ex debito justitiae*, irrespective of the merits and without any terms. Such court power is inherent and does not require any statutory provision (see *In Re Yamamoto Ryoji & Anor; Petitioner* [2020] 10 CLJ 75; [2021] 8 MLJ 386).

[50] In a nutshell, the said decrees were obtained improperly from this court, rendering them null and void. Based on the above-said facts and the application before me, this court granted the RH's application in encl. 33 without a costs order.